STATE OF MICHIGAN

COURT OF APPEALS

RONALD AYER,

Plaintiff-Appellant,

v

HARE EXPRESS, INC.,

Defendant-Appellee.

UNPUBLISHED
January 15, 2004

No. 243228
Oakland Circuit Court
LC No. 01-036209-NZ

Before: Hoekstra, P.J., and Sawyer and Gage, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) in this Persons With Disabilities Civil Rights Act action (hereinafter "PWDCRA"). We affirm.

We review rulings on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "A motion brought under MCR 2.116(C)(10) tests the factual basis of a plaintiff's claim." *Nicita v Detroit*, 216 Mich App 746, 750; 550 NW2d 269 (1996). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). A trial court "may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id*.

"To establish a prima facie case of discrimination under the [PWDCRA], a plaintiff must show that (1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999). "Before a court can address a plaintiff's ability to perform his job, any alleged discrimination and certainly any pretext for the 'discrimination,' the plaintiff must establish that he is the type of person to which the statute was meant to pertain – a person with a 'disability.'" *Id*.

The PWDCRA defines a "disability" as follows:

> (i) A determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic:
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> (A) . . . substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's ability to perform the duties of a particular job or position or substantially limits 1 or more of the major life activities of that individual and is unrelated to the individual's qualifications for employment or promotion.
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> (iii) Being regarded as having a determinable physical or mental characteristic described in subparagraph (i). [*Chiles, supra*, 473-474.]

"The purpose of the [PWDCRA] is similar to the purposes of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*," and this Court has noted that "[b]ecause of the similarity in purpose and the similarity in definitions . . . it is appropriate to look to . . . the ADA for guidance in interpreting the terms 'substantially limits' and 'major life activities' under the [PWDCRA]." *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216-217; 559 NW2d 61 (1996). "For purposes of . . . the ADA . . . administrative regulations define 'major life activities' as 'functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.'" *Id.*, 217-218, quoting 29 CFR 1630.2(i).

Plaintiff first argues that the trial court erred in granting summary disposition in favor of defendant. Specifically, plaintiff maintains that his heart condition qualifies as a disability because it substantially limits the major life activity of working, and that it is unrelated to his ability to perform the duties of his job because working more than 40 hours per week is not an essential function of the job of a truck driver. We disagree.

Our Supreme Court has observed that "in interpreting provisions of the [PWDCRA], analogous federal precedents are persuasive, although not necessarily binding." *Chmielewski v Xermac, Inc*, 457 Mich 593, 601-602; 580 NW2d 817 (1998). The instant case is closely analogous to *Kolpas v G D Searle & Co*, 959 F Supp 525, 529 (ND Ill, 1997), where the plaintiff alleged that her heart condition was a disability. However, the court held that the plaintiff "ha[d] not demonstrated that this condition left her impaired to the point that she was substantially limited in one or more major life activities." *Id.*, 529. The plaintiff regularly worked between 60 and 70 hours per week, but was advised by her doctor to work a normal 40 hour work week to avoid stress and anxiety which could exacerbate her heart condition. *Id*., 527, 529. Also, the court held that the plaintiff's "need[] to work a normal forty-hour week to avoid stress . . . is not sufficient to constitute a disability," because "the inability to work more than forty-hours per week by itself does not constitute a substantial limitation on the major life activity of working." *Id*., 529; see also, *Duff v Lobdell-Emery Mfg Co*, 926 F Supp 799, 808 (ND Ind, 1996) ("an impairment that renders a person incapable of working more than forty hours in a week is not a disability under the ADA") and *Cotter v Ajilon Services, Inc*, 287 F3d 593, 598-599 (CA 6, 2002) ("an inability to work overtime is not a substantial limitation on the ability to work").

In *Kolpas, supra*, 529-530, the court explained that "the analysis of plaintiff's ability to work must focus on her general capability to function in the general work force," and that "there ha[d] been no showing that plaintiff's ability to work generally is substantially limited." Indeed, the plaintiff "admitted that the [heart] condition does not interfere with her ability to work or hold a job," and "currently works in the accounting department for another corporation." *Id*., 530. The Court determined that "it [wa]s quite apparent that plaintiff is perfectly able to perform her accounting position with her new company and to work in general." *Id*.

Similarly, in the instant case, plaintiff was unable to show that he had a disability, i.e., the inability to work more than 40 hours per week is not sufficient to constitute a disability, because alone, it does not constitute a substantial limitation on the major life activity of working. Additionally, this Court has held that "the inability to perform a *particular* job does not constitute a substantial limitation." *Chiles, supra*, 478 (emphasis in original). "Instead, the impairment must significantly restrict an individual's ability to perform at least a wide range of jobs." *Id*. As in *Kolpas, supra*, 529-530, there was no showing that plaintiff's ability to work generally is substantially limited. To the contrary, plaintiff works 4 to 4½ hours per day, 6 days a week as a truck driver for Taylor Postal Contracting, and stated that he would work 40 hours per week if more runs were available. Because it is clear that plaintiff can perform his truck driving job with a different company and work in general, plaintiff did not demonstrate that his heart condition significantly restricted his ability to perform at least a wide range of jobs.

Viewing the evidence in the light most favorable to plaintiff, plaintiff did not demonstrate a genuine issue of material fact that would warrant denying defendant's motion for summary disposition. The evidence demonstrates that working more than 40 hours per week was an essential function of being an over-the-road truck driver for defendant, and plaintiff admitted that he worked 70 to 80 hours per week for defendant. Additionally, Robert Hare, owner of defendant company, stated that if someone applied for a job as a full time driver, but could not work more than 40 hours per week, it would not be in keeping with efficient operations for defendant to hire that driver, and such a driver would not qualify for the job. While plaintiff's heart condition was related to his ability to perform the duties of the particular job for defendant (he could not work more than 40 hours per week), plaintiff's heart condition did not substantially limit his major life activity of working, as is evidenced by his employment as a truck driver for Taylor Postal Contracting.

Plaintiff next maintains that heavy lifting is not part of the essential function of the job of a truck driver, and therefore the trial court's grant of summary disposition in favor of defendant on this basis was improper. Specifically, plaintiff argues that his 10 pound lifting restriction "certainly effected [sic] his daily functions," and that "it is reasonable to infer that a normal person within the general population could in fact lift more than 10 pounds throughout the performance of daily activities." Plaintiff argues that "the impact of [his physical] restraints on his physical strength and his inability to perform daily life activities like a member of the general population" was enough evidence to show that a genuine issue of material fact exists as to his disability. We disagree. We believe that summary disposition in favor of defendant was appropriate, because plaintiff's lifting restriction does not impose substantial limitations on his ability to perform the normal activities of daily living, and therefore does not constitute a disability.

This Court has noted that "federal courts have held that where the major life activity is lifting, a general lifting restriction, without more, is insufficient to constitute a disability," and held that "a lifting restriction constitutes a disability under the PWDCRA when it imposes substantial limitations on an individual's ability to perform the normal activities of daily living." *Lown v JJ Eaton Place*, 235 Mich App 721, 732; 598 NW2d 633 (1999). In that case, the plaintiff presented medical proofs establishing that she was restricted from lifting over 10 to 15 pounds for a two-year period. The trial court granted summary disposition in favor of the defendant, holding that the plaintiff was not disabled under the PWDCRA. *Id*., 725. On appeal, the plaintiff asserted that there are "obviously significant restrictions" on her activities, but the only constraint identified was that she could not bowl. *Id*., 734. Similarly, in the instant case, plaintiff presented evidence that he was restricted from lifting more than 10 pounds. However, plaintiff stated that he fishes, cuts the lawn, helps clean the house, vacuums, makes the beds, carries groceries, and takes out the garbage.

Plaintiff did not meet his burden of coming forward with evidence to show the existence of a genuine issue of material fact concerning whether a major life activity was substantially limited by his heart condition. It is not sufficient that plaintiff presented evidence that he believed he was discharged while under a 10 pound lifting restriction. Because plaintiff did not make a showing that the performance of the normal activities of daily living were affected by the lifting restriction, plaintiff has not established that he was "substantially limited" in a nonwork major life activity. MCL 37.1103(d)(i)(A). This Court has held that "if an individual is not substantially limited with respect to any other major life activity, the individual's ability to perform the major life activity of working should be considered." *Lown, supra*, 735. Plaintiff did not demonstrate that he was substantially limited in the major life activity of working. Plaintiff did not meet his burden of establishing a genuine issue of material fact for trial with regard to the issue of whether he was substantially limited in lifting, a nonworking major life activity. Moreover, plaintiff did not demonstrate that he was disabled as defined by the PWDCRA.

Plaintiff next argues that the doctor's notes that indicated that he could not work more than 40 hours per week or lift more than 10 pounds constituted a request for an accommodation, as required by MCL 37.1210(18), which provides in pertinent part:

> A person with a disability may allege a violation against a person regarding a failure to accommodate under this article only if the person with a disability notifies the person in writing of the need for accommodation within 182 days after the date the person with a disability knew or reasonably should have known that an accommodation was needed.

We do not believe that the doctor's notes notified defendant of the need to accommodate plaintiff: they notified defendant of plaintiff's heart condition and physical limitations, but failed to inform defendant about what accommodations would be necessary. Further, Hare stated that plaintiff never submitted a written request for an accommodation or a change in work assignment as a result of his heart condition.

Plaintiff cites no authority for the proposition that doctor's notes detailing a person's physical limitations constitute a request for an accommodation for those limitations, in the absence of a specific request for such an accommodation. It is well settled that "a party may not

leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987). In any event, reasonable minds could not differ that plaintiff did not comply with the statutory requirement set forth in MCL 37.1210(18); consequently, defendant was not required to accommodate him.

Finally, plaintiff argues that the trial court erred in its determination that a work schedule of 40 hours per week amounts to a restructuring of plaintiff's job, and that defendant was not obligated to accommodate such a restructuring. MCL 37.1102(2) provides in pertinent part that "a person shall accommodate a person with a disability for purposes of employment . . . unless the person demonstrates that the accommodation would impose an undue hardship." MCL 37.1210(1) provides in pertinent part:

> In an action brought pursuant to this article for failure to accommodate, the person with a disability shall bear the burden of proof. If the person with a disability proves a prima facie case, the person shall bear the burden of producing evidence that an accommodation would impose an undue hardship on that person. If the person produces evidence that an accommodation would impose an undue hardship on that person, the person with a disability shall bear the burden of proving by a preponderance of the evidence that an accommodation would not impose an undue hardship on that person.

This Court has ruled that an employer has no duty under the PWDCRA to accommodate an employee who is not disabled within the meaning of the act. *Harris v Borman's Inc*, 170 Mich App 836, 839-840; 428 NW2d 790 (1988). Additionally, "an employer . . . has no duty to accommodate the plaintiff by recreating the position, adjusting or modifying job duties otherwise required by the job description, or placing the plaintiff in another position." *Kerns v Dura (On Remand)*, 242 Mich App 1, 16; 618 NW2d 56 (2000).

Plaintiff was unable to show that he was disabled, because his heart condition was related to his ability to be an over-the-road truck driver, and affected his ability to perform the job. Further, the evidence demonstrated that working 60 to 70 hours per week was an "essential function" of an over-the-road truck driver, and reducing working hours that constitute an essential job function is not required for purposes of accommodation. Therefore, defendant did not have a duty to accommodate plaintiff in the manner desired.

In sum, the trial court properly granted summary disposition in favor of defendant because plaintiff failed to establish a prima facie case of discrimination under the PWDCRA.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Hilda R. Gage